No. 56983-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALPHONSO BELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

REPLY BRIEF OF THE APPELLANT

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A. INTRODUCTION

The State agrees the legislature has limited the trial court's authority to impose LFOs. Now, courts can no longer impose certain LFOs, and courts can no longer impose other LFOs where a person is indigent. Even though Mr. Bell is indigent, the State asks this Court to remand to the trial court for further determination. This is unnecessary. This Court should remand to strike the improperly imposed LFOs.

In addition, Mr. Bell's judgment and sentence is currently comprised of three separate documents entered on three separate dates. On remand, the trial court may issue yet another order revising a portion of the judgment and sentence. These kinds of piecemeal orders amending a judgment and sentence is not contemplated by the SRA. On remand, this Court should also instruct the trial court to issue a new, complete judgment and sentence that accurately reflects Mr. Bell's sentence.

B. ARGUMENT

1. The State concedes the trial court exceeded its authority when it imposed LFOs.

a. This Court should remand to strike the filing fee, attorney costs, appellate costs, as well as the interest provision and all accrued interest.

The State agrees the trial court cannot impose filing fees, attorney costs, and appellate costs on a person who is indigent. Br. of Resp't at 5-9. However, it argues this Court should remand for the trial court to determine whether Mr. Bell is indigent. Br. of Resp't at 9. It also argues the trial court should consider the interest provision and any accrued interest on remand. Br. of Resp't at 12-13.

But the trial court has already found Mr. Bell indigent, which is clearly documented in the record. CP 63-67, 73-74. He has been represented by an attorney at public expense throughout the case, including at his initial sentencing, his new sentencing, and on appeal. *See* RCW 10.101.010(3)(d). It is unnecessary to remand for the trial court to determine whether

Mr. Bell is indigent. This Court should remand and direct the trial court to strike these costs.

The State also agrees the trial court no longer has authority to impose interest on non-restitution LFOs and must strike any accrued interest. Br. of Resp't at 13. However, it argues the proper remedy is for the trial court to consider any interest accrual and outstanding interest on remand. Br. of Resp't at 13.

But the legislature removed the trial court's authority to impose interest and required courts to strike any accrued interest. RCW 10.82.090. This applies to *any* defendant, regardless of their indigency or ability to pay. It is unnecessary for this Court to remand for any further determination on this issue. This Court should remand and direct the trial court to strike the interest provision and all accrued interest.

b. This Court should remand to strike the DNA collection fee.

The State concedes the trial court cannot impose the DNA collection fee where the court has previously imposed it.

Br. of Resp't at 10-12. However, it argues this Court should remand for the trial court to determine whether the court has previously ordered Mr. Bell to pay this fine pursuant to a prior conviction. Br. of Resp't 10-11.

However, because Mr. Bell was previously convicted of a felony, this Court should presume the DNA collection fee was previously imposed. CP 20; *State v. Houck*, 9 Wn. App. 2d 636, 651 n.4, 446 P.3d 646 (2019). This Court should accept the State's concession and remand to the trial court to presumptively strike the DNA collection fee unless the State demonstrates it has not been previously imposed. *Id*. at 651.

c. This Court should remand to strike the supervision fees.

The State concedes the trial court exceeded its authority when it imposed supervision fees as a condition of community custody. Br. of Resp't at 9-10. This Court should accept the State's concession and remand to the trial court to strike them.

2. The Excessive Fines Clause prohibits disproportional punishment, which requires consideration of the offender's circumstances.

a. Whether the victim penalty assessment violates the Excessive Fines Clause is an issue of manifest constitutional error.

This Court should review the issue of whether the victim penalty assessment violates the Excessive Fines Clause because the trial court's failure to weigh proportionality before imposing the payment is "manifest error affecting a constitutional right." RAP 2.5(a)(3). Contrary to the State's assertion, the issue satisfies the requirements of RAP 2.5(a)(3) because (1) the error is truly of constitutional magnitude and (2) the error is manifest. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

First, the issue implicates Mr. Bell's constitutional right to not face disproportional punishment. *State v. Ramos*, 24 Wn. App. 2d 204, 214, 520 P.3d 65 (2022). As this Court has held, "[t]his claim certainly implicates a constitutional interest." *Id*.

Second, the error is "manifest" because the trial court imposed a financial penalty that Mr. Bell cannot pay. This Court has already held an excessive fines challenge to the victim penalty assessment is manifest constitutional error where the person is unable to pay. *Ramos*, 24 Wn. App. 2d at 214. And the record shows this error has "practical and identifiable consequences." *O'Hara*, 167 Wn.2d at 99. Mr. Bell has no ability pay: he is indigent and has no assets, income, or financial resources. CP 66-67.

Mr. Bell's constitutional claim warrants review under RAP 2.5(a)(3). This Court should consider Mr. Bell's claim and answer the U.S. Department of Justice's call to state and local courts "to ensure that their assessment of fines and fees is constitutional and nondiscriminatory." Letter from Vanita Gupta, Associate Attorney General, U.S. Department of Justice (April 20, 2023).[1] This Court should review Mr. Bell's claim

[1] Available at: https://www.justice.gov/opa/press-release/file/1580546/download

and remedy the constitutional error "that result[ed] in serious injustice." *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

b. Binding precedent makes clear the victim penalty assessment is subject to the Excessive Fines Clause because it is at least partially punitive.

Under the statute's plain language, the victim penalty assessment is at least partially punitive, and it is therefore subject to the Excessive Fines Clause. RCW 7.68.035(1)(a); Br. of Appellant at 14-16.

The State relies on outdated, decades-old cases that should not guide this Court's analysis. Br. of Resp't at 17-18 (citing *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992), *State v. Humphrey*, 139 Wn.2d 53, 983 P.2d 1118 (1999)).

Curry and *Humphrey* do not resolve the issue raised in this case for three reasons. First, neither case involved an excessive fines challenge. The defendants in *Humphrey* did not raise an excessive fines argument, and the Supreme Court did not reach any of their constitutional arguments. 139 Wn.2d at

63. And *Curry* held the victim penalty assessment is constitutional without specifying on what grounds. 118 Wn.2d at 917-18. Indeed, "*Curry*'s reasoning is vague; it does not state precisely what constitutional arguments it took into account." *State v. Tatum*, 23 Wn. App. 2d 123, 130, 514 P.3d 763 (2022) (citing *Curry,* 118 Wn.2d at 913-17). *Humphrey*, *Curry*, and the cases based on those decisions that the State relies on are therefore not helpful to this Court's analysis under the Excessive Fines Clause. *See* Br. of Resp't at 17-20.

Second, these cases conflict with more recent, binding precedent. In recent years, the United States and the Washington Supreme Courts have held the Excessive Fines Clause applies to all payments that are "at least *partially* punitive." *Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 659, 203 L. Ed. 2d 11 (2019) (emphasis added); *City of Seattle v. Long*, 198 Wn.2d 136, 162-63, 493 P.3d 94 (2021). *Humphrey* did not consider whether the victim penalty assessment was even partially punitive, and *Curry* did not examine whether the

victim penalty assessment was punitive at all. Indeed, the State never addresses whether the victim penalty assessment is *partially* punitive. *See* Br. of Resp't at 16-21.

Third, the plain language of the victim penalty assessment statute indicates it is at least partially punitive. In *Long*, the Washington Supreme Court examined the plain language in another statute to conclude the payment in that case was partially punitive. 198 Wn.2d at 163-64. The statutory language at issue in *Long* is identical to the language in the victim penalty assessment statute, demonstrating it is at least partially punitive. *Compare id.* (the payment was "in addition to *any other penalty*" (citing SMC 11.72.440(E)), *with* RCW 7.68.035(1)(a) (the victim penalty assessment "shall be in addition to *any other penalty*"). The Washington Supreme Court's decision in *Long*—not *Curry* or *Humphrey*—guides this Court's analysis of Mr. Bell's excessive fines challenge to the victim penalty assessment.

The victim *penalty* assessment is a *penalty*. RCW 7.68.035(1)(a); *see Long*, 198 Wn.2d at 163-64. The Excessive Fines Clause requires the court to weigh proportionality, which includes consideration of a person's ability to pay. *Id*. at 166-67, 173. Because the victim penalty assessment has no connection to the offense and Mr. Bell is unable to pay, it is unconstitutionally excessive. Br. of Appellant at 16-18.

3. The plain language of the statute requires the court enter a *judgment and sentence* and does not permit any other kind of document to reflect the sentence.

The plain language of RCW 9.94A.475 requires "a current, newly created or reworked judgment and sentence document" to reflect a person's sentence. Yet, the State examines this same plain language to argue the statute permits entry of separate orders. Br. of Resp't at 21-23.

But the statute clearly requires a singular "*judgment and sentence document*" and does not permit an order or any other kind of filing. RCW 9.94A.475 (emphasis added). This statute does not mention any other kind of document such as an order,

and the State "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). The plain language intends the judgment and sentence to be a single, freestanding document that reflects the finding of guilt and punishment. And even a "reworked judgment and sentence" is still a complete—though revised—single document.

This case demonstrates the problem with trial courts issuing orders to amend portions of the sentence instead of issuing a complete judgment and sentence. Currently, Mr. Bell's judgment and sentence is comprised of *three* separate documents with three different dates. CP 18-30, 57-61, 82-83. If this Court remands to the trial court to strike the improperly imposed LFOs and does not instruct the trial court to issue a complete judgment and sentence, it could result in Mr. Bell's judgment and sentence consisting of *four* separate documents, if not more. In addition, had the trial court issued a new, complete

judgment and sentence after the new sentencing hearing, it would not have inadvertently imposed those erroneous portions of the sentence that Mr. Bell challenged on appeal. *See* Section B.1; Br. of Appellant at 6-13. This practice is contrary to the plain language of the SRA, hampers accurate administration by DOC and court clerks, and muddies the public record.

4. Mr. Bell also asks this Court to consider the arguments in his Statement of Additional Grounds for Review.

Mr. Bell advanced two additional arguments in his Statement of Additional Grounds for Review. He requests this Court to also consider those arguments.

C. CONCLUSION

This Court should remand to the trial court to strike the impermissible LFOs and also instruct the court to enter and new, complete judgment and sentence document.

I certify this brief contains 1,911 words and complies with RAP 18.17.

Respectfully submitted this 3rd day of May 2023.

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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 56983-3-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered by other court-approved means to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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